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Supreme Court, U.S.
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No. 01-____

IN THE

Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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104 pp

QUESTION PRESENTED

Whether, as the divided Ninth Circuit held below, a wholly private entity is constrained by the First Amendment when controlling protests on its own private sidewalk on the basis that the sidewalk – although private property – resembles a "public forum" in certain respects, or whether, as other federal and state courts have held and as this Court's decisions instruct, a private entity's control of expressive activity on its own property can be deemed state action subject to the First Amendment only in exceptionally narrow circumstances involving the equivalent of a "company town."

PARTIES TO THE PROCEEDING

In addition to petitioner Venetian Casino Resort, L.L.C., the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226, and Bartenders Union, Local No. 165, Stewart L. Bell, District Attorney of Clark County, Nevada, the Las Vegas Metropolitan Police Department, Clark County, Nevada, and the American Civil Liberties Union, are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Petitioner Venetian Casino Resort, L.L.C., has no parent corporation. Las Vegas Sands, Inc., which has publicly traded debt but no publicly traded stock, owns more than 10% of the stock of Venetian Casino Resort, L.L.C. No other publicly held company owns 10% or more of the stock of Venetian Casino Resort, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Venetian Casino Resort L.L.C. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). A divided panel of the Ninth Circuit nonetheless held below that petitioner Venetian Casino Resort L.L.C. ("Venetian"), though strictly a private entity, is constrained by the First Amendment when controlling picketing and demonstrations on its own private sidewalk. What is more, the majority reached that determination without undertaking any analysis into whether Venetian's control of its own property can be considered "state action." The court instead assumed that Venetian was subject to the First Amendment based on a conclusion that its private sidewalk resembles a "public forum" in its functional and physical attributes.

"Public forum" doctrine *presupposes* the existence of state action, however, and the Ninth Circuit's cart-before-the-horse approach destroys the most basic rights of private property ownership. Public forum analysis determines the validity of a *governmental* restriction of speech on property that the *government* controls. Until now, no court has used public forum analysis to determine whether the circumstances involve governmental action in the first place. But the opinion below holds that a private entity forfeits its basic prerogative to control the use of its own property by the public whenever its property is deemed to resemble a "public forum." Applying that approach here, the majority found that Venetian is compelled by the First Amendment to allow mass demonstrations on its private property, treating Ve-

netian's sidewalk as if it were public and Venetian as if it were the State. That result works an especially acute infringement of a landowner's rights in the circumstances, forcing Venetian to make space available on its own private property for picketing and protests deliberately designed to destroy its own business interests.

Not surprisingly, the opinion below conflicts with a slew of federal and state court decisions recognizing the need to establish the existence of state action as a threshold matter, before addressing whether the state action restricts speech in a "public forum." And the opinion below necessarily breaks with the settled rule in decisions of this Court that a private entity's control of expressive activity on its own property amounts to state action only in one, exceptionally narrow situation: when the entity controls the functional equivalent of an entire municipality, *i.e.*, a "company town." The Ninth Circuit has extended the "company town" exception far beyond anything recognizable in this Court's jurisprudence. Finally, and most particularly, the decision below is directly at odds with an opinion of the Nevada Supreme Court finding that another hotel-casino's control of expressive activity on the private sidewalk located *directly across the street* from Venetian's is *not* constrained by the First Amendment, so that conflicting constitutional rules now govern opposite sides of one of the most traveled pedestrian thoroughfares in the world – the Las Vegas Strip. Those various conflicts warrant this Court's review, especially in view of the significant implications of the opinion below for the basic rights of private property owners throughout the substantial geographic sweep of the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-38a) is reported at 257 F.3d 937. The opinion of the district court denying Venetian's motion for summary judgment (App. 41a-46a) is not reported. The opinion of the district court deny-

ing Venetian's motion for a preliminary injunction (App. 47a-61a) is reported at 45 F. Supp. 2d 1027 (D. Nev. 1999).

JURISDICTION

The opinion of the Ninth Circuit was issued on July 12, 2001. The petition for rehearing and rehearing en banc was denied on August 23, 2001. On November 7, 2001, Justice O'Connor granted petitioner an extension until December 21, 2001, to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background.

1. Petitioner Venetian owns and operates the Venetian Casino Resort, a luxury hotel-casino located in Las Vegas, Nevada, on Las Vegas Boulevard, a State highway commonly known as "the Las Vegas Strip." App. 2a. In February 1997, before beginning construction of the hotel-casino, Venetian entered into a "pre-development agreement" with respondent Clark County. The agreement contemplated that Venetian would convey property rights to the County or State if required to alleviate the development's anticipated impact on vehicular and pedestrian traffic, including any "public rights-of-way" that might be "needed" to "facilitat[e] the perpetual flow of pedestrian traffic." *Id.* at 49a. Venetian agreed to abide by the results of a County-approved study assessing the effect of the new construction on vehicular and pedestrian traffic. *Id.* at 2a.

The traffic study was completed in September 1997, and it recommended widening Las Vegas Boulevard by one lane along the Venetian frontage. App. 2a. The additional traffic lane would displace a public sidewalk running alongside the roadway, and would take up the full State of Nevada right-of-way on Las Vegas Boulevard, leaving no remaining public right-of-way for a new public sidewalk. Unless the State

obtained an expansion of its right-of-way, therefore, any new sidewalk would have to be constructed on Venetian's private property. The study did not require Venetian to dedicate a right-of-way to the State. *Id.* at 2a-3a.

Venetian entered into negotiations with the Nevada Department of Transportation to resolve the issue of pedestrian passage along (and pedestrian access to) the hotel-casino frontage on Las Vegas Boulevard. Because Las Vegas Boulevard sits on a State, not County, right-of-way, the County deferred to the State to develop an acceptable solution. App. 3a, 50a. In its negotiations with the State, Venetian of course aimed to ensure that pedestrians would have ample access to its hotel-casino frontage. At the same time, Venetian also sought to retain control over its private property to the fullest possible extent.

2. The discussions between Venetian and the State produced an agreement on January 8, 1999 ("the 1999 Agreement"). *See* App. 19a-22a. The parties explicitly refrained from requiring Venetian to dedicate a public right-of-way to the State for a new public sidewalk. Instead, the agreement calls for Venetian to "construct and maintain on *its* property along Las Vegas Boulevard South a *private* sidewalk connecting to public sidewalks on either side of its property." *Id.* at 20a (¶ 1) (emphasis added). Every subsequent reference to the sidewalk explicitly reaffirms that it is "private." *See id.* at 20a-21a. To reinforce that the sidewalk is fully "private" and that there was no dedication of the sidewalk to the State, the agreement emphasizes that Venetian "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments," and that the State "is not taking any private property interest with this document." *Id.* at 21a, 22a (¶¶ 1, 6).

The agreement also reflects in several additional respects the private nature of the sidewalk and the absence of any

dedication of the sidewalk to the State. For instance, the agreement assigns to Venetian exclusive responsibility for "keep[ing] and maintain[ing]" its "private sidewalk" at "all times in an orderly, clean, safe, and sanitary condition" at its "sole expense," and requires Venetian to "absolve, indemnify, and defend" the State "from any and all cost, expense, or liability arising from the . . . use of the private sidewalk." App. 20a (¶¶ 4, 5). The agreement also treats Venetian's private sidewalk like any other private sidewalk fronting a privately owned place of public accommodation, obligating Venetian to "satisfy the Americans with Disabilities Act" requirements applicable to all such public accommodations – *i.e.*, that "pedestrian access" along the "private sidewalk" be "unobstructed." *Id.* (¶ 1). Finally, the agreement contemplates only one situation in which Venetian might be required – in the future – to relinquish its property rights and to "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk: if, and only if, the "private sidewalk" were to be "removed, altered, or abandoned." *Id.* at 21a (¶ 7).

3. In February 1999, the public sidewalk formerly running alongside Las Vegas Boulevard was demolished to enable construction of the new traffic lane. Venetian built a temporary private sidewalk on its property adjacent to the widened roadway where the private sidewalk described in the 1999 Agreement soon would be constructed. The company subsequently became aware that respondents Local Joint Executive Board of Las Vegas, Culinary Workers, Union Local No. 226 and Bartenders Union, Local No. 165 (the "Unions"), planned to hold a demonstration at the Venetian property to protest the company's labor policies. The County granted the Unions a permit allowing them to conduct a demonstration on March 1, 1999, on Las Vegas Boulevard in front of the Venetian and on the surrounding sidewalks. In anticipation of the demonstration, Venetian clearly marked its property lines and posted signs identifying the private sidewalk as its private property. App. 4a.

The demonstration went forward as planned, with more than 1,300 persons participating in various activities – including organized picketing – that extended onto Venetian's private sidewalk. When the demonstrators refused to abandon the sidewalk, Venetian sought the assistance of local authorities to confine the demonstration to the adjacent public street and the public sidewalks on either side. But respondents Clark County, District Attorney Stewart L. Bell, and the Las Vegas Metropolitan Police Department (the "Government Officials"), refused to intervene, based on a belief that Venetian's private sidewalk – although private property – was a "public forum" for First Amendment activity. The Unions later expressed plans to organize further demonstrations on the private sidewalk. App. 4a.

In response, Venetian filed this action against the Government Officials and Unions, alleging that their refusal to recognize and enforce Venetian's property rights constructively converted its private property into a public forum, and seeking a declaratory judgment that its private sidewalk was not a public forum and that the Government Officials' and Unions' actions amounted to a taking of its property interests in violation of the Due Process Clause. Venetian then filed a motion for a preliminary injunction seeking to bar the Government Officials from authorizing demonstrations on its property and from refusing to enforce its property rights. Respondent ACLU intervened, and filed a counterclaim seeking a declaratory judgment that Venetian's private sidewalk is a public forum for First Amendment activity.

B. Decisions Below.

1. a. The district court denied Venetian's motion for a preliminary injunction. App. 47a-61a. Significantly, the court agreed with Venetian that the sidewalk was its private property and that it had not "waived its right to exclude." App. 57a. But the court nonetheless rejected Venetian's contention that, as a private entity, its control of its private side-

walk was not subject to the First Amendment. The court acknowledged the "general rule" that the "Constitution does not apply to private conduct." *Id.* at 59a. Relying on *Marsh v. Alabama*, 326 U.S. 501 (1946), however, the court determined that Venetian's performance of an "exclusive governmental function," *i.e.*, that of "owning and maintaining" a sidewalk that runs alongside a major public street and serves the needs of the public, rendered it a state actor. *Id.* at 60a. The court thus held that Venetian's control of its private sidewalk was subject to the same standards that restrict the government's control of a public sidewalk – *viz.*, Venetian could only impose "content neutral and reasonable time, place, and manner restrictions." *Id.* at 61a.

b. The district court later denied Venetian's motion for summary judgment, ruling that its order denying a preliminary injunction had disposed of the issues. App. 41a-46a. The court then granted judgment in favor of respondents, including on respondent ACLU's counterclaim. *Id.* at 39a-40a.

2. a. A divided panel of the Ninth Circuit affirmed. Rather than addressing the issue decided by the district court – *i.e.*, whether Venetian can be considered a state actor bound by the First Amendment—the panel majority framed the "question . . . presented [on] appeal" as "whether a sidewalk constructed on private property to replace a public sidewalk, accommodating pedestrian traffic adjacent to Las Vegas Boulevard, is a public forum." App. 2a. Strictly adhering to that question, the opinion eschews any analysis of whether Venetian can properly be treated as a state actor, focusing instead solely on whether Venetian's private sidewalk bears the characteristics of a "public forum" within the meaning of that familiar First Amendment doctrine.

The majority applied a number of factors used by courts to determine whether property is a "public forum." First, the majority considered whether the property had historically

been used as a public forum for expression. App. 10a-11a. While it was true that the land on which Venetian's private sidewalk sits has always been private property, *id.* at 10a, the majority reasoned, "[i]t is the historical use of the sidewalk adjacent to Las Vegas Boulevard that is significant, not the piece of land on which the replacement sidewalk is located." *Id.* at 11a. And it was undisputed, the majority noted, that the sidewalk previously existing on public property was a public forum. *Id.*

Second, the majority weighed whether the property's physical location and functional characteristics were suggestive of a public forum. App. 11a-13a. The majority observed in that regard that the "newly constructed sidewalk still performs the same role as a thoroughfare for pedestrian traffic along Las Vegas Boulevard," in reliance on public forum decisions distinguishing public sidewalks that function as a thoroughfare from public sidewalks that only allow ingress and egress to and from public facilities. *Id.* at 12a. In addition, the majority believed, there was "little to distinguish" Venetian's private sidewalk from the adjoining public sidewalks. *Id.* at 13a. The majority accepted that the Venetian sidewalk contains distinctive paving patterns and color schemes matching the large plaza area that runs seamlessly from the sidewalk to the hotel-casino. *Id.* But the majority found significant that "there are no barriers or other physical boundaries" indicating that Venetian's private sidewalk is a "special type of enclave" with a "different legal status" from the public sidewalks on either side. *Id.* (internal quotation marks omitted).

Third, the majority assessed whether Venetian had dedicated its sidewalk to the public. App. 14a-16a. The majority looked to the terms of the 1999 Agreement for evidence of a dedication. But the majority made clear that its reading of the agreement was shaped by – and was "in th[e] context" of – its conclusion that the "function" of Venetian's private

sidewalk "was to be the same as the former public sidewalk in front of the Venetian and the [public] sidewalks connecting on either side." *Id.* at 7a. Having assumed that Venetian's private sidewalk was intended to serve precisely the same function as those public sidewalks, and also that the 1999 Agreement was designed to effectuate that intention, the majority found that Venetian's private sidewalk likewise had been dedicated to the State. *Id.* at 14a-16a. The majority reached that determination notwithstanding the numerous provisions in the 1999 Agreement confirming the absence of any such dedication, and notwithstanding the district court's conclusion that the 1999 Agreement did not grant the public a right of access.[1]

The majority summarized its analysis as follows: "Given the historically public character of the predecessor's sidewalk, the replacement sidewalk's current public use, its similarity to and interconnection with Las Vegas' network of public sidewalks, and its dedication to public use under [the] 1999 Agreement," "we conclude that the Venetian's sidewalk constitutes a public forum subject to the protections of the First Amendment." App. 19a.

b. Judge Brunetti dissented. In his view, this case turns on the basic rule "that the First Amendment only applies to state actors" and affords no "protection or redress against

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[1] The majority opinion pointed to the requirements that Venetian: (1) connect its "private sidewalk" to the "public sidewalks" on either side; (2) satisfy the ADA's requirement that "pedestrian access" along the sidewalk be "unobstructed,"; (3) remove improvements on the sidewalk that present a "hazard or obstruction" to pedestrian traffic; and (4) "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk *in the future* should the "private sidewalk" ever be "removed, altered, or abandoned." App. 14a-15a. According to the majority, those provisions, "[r]ead together" and considered in the context of the assumptions that governed its interpretation of the agreement, "constitute a dedication of the sidewalk" to the public *at the present*. *Id.* at 15a.

abridgement of free expression by private" entities. App. 37a. The majority "ignores this fundamental axiom," Judge Brunetti explains, and "applies the First Amendment to a private corporation's regulation of its own private sidewalk." *Id.* "To arrive at this curious result," the dissent observes, "the majority relies on case law which does not address the issue of state action, but rather focuses on whether private land can be a public forum, an issue that we can only reach *after* finding a state actor." *Id.* (emphasis added).

In particular, the dissent explains, the circumstances call for a "two-step inquiry:" first, a determination whether the private property owner can be treated as a state actor; and second, and only if so, an analysis of the particular "forum at issue" to establish the relevant First Amendment standards. App. 25a (citation omitted). By skipping ahead to the second step without resolving the first, the majority "broadens the scope of who is a state actor," because "private pieace of property of a type traditionally owned and operated by the public or . . . used in a manner traditionally associated with the public will presumptively satisfy the state action requirement." *Id.* at 31a-32a. The result, in the view of the dissent, is to "undercut[] the ability of private actors to negotiate and determine the rights that apply to their property, if that piece of property happens to be space traditionally construed as public." *Id.* at 32a. Here, for instance, the majority interprets the 1999 Agreement in a "nonsensical" manner, "cobbling together a dedication from various provisions in the contract, while ignoring the great weight of the contractual language demanding the opposite conclusion." *Id.* at 34a-35a. The upshot of the majority's approach, according to the dissent, is to "extend[] the First Amendment far beyond its intended reach and [to] undermine the rights of private property owners." *Id.* at 38a.

c. The Ninth Circuit denied the petition for rehearing and rehearing en banc, but Judge Brunetti voted to grant re-

hearing and recommended granting the suggestion for rehearing en banc. App. 62a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S APPROACH TO DETERMINING WHETHER A PRIVATE ENTITY'S CONTROL OF ITS PROPERTY IS SUBJECT TO THE FIRST AMENDMENT CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

The opinion below eschews any conventional analysis of state action – indeed, the words "state action" appear nowhere in the majority's analysis – focusing instead exclusively on whether Venetian's private sidewalk bears the attributes of a "public forum." In the Ninth Circuit's view, if Venetian's private sidewalk sufficiently resembles a "public forum" sidewalk, then Venetian's control of the sidewalk constitutes state action subject to the First Amendment.

That analysis is deeply flawed. Public forum doctrine establishes the rules for assessing the validity under the First Amendment of a *governmental* restriction of speech on property that the *government* controls. The basic principle is that the government faces greater constraints when regulating speech in a "public forum" for expressive activity and enjoys greater leeway when regulating speech in a "nonpublic forum." *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-79 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983). Public forum analysis thus presupposes a restriction of speech *by the government*, and merely determines which First Amendment standards apply to that restriction based on the characteristics of the property at issue.[2] Public

[2] *See Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2099 (2001) ("The standards that we apply to determine whether a *State* has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum.") (emphasis added); *Lee*, 505 U.S. at

forum doctrine has never been used – at least until the Ninth Circuit's decision below – to resolve the antecedent question whether governmental action is involved *at all*.

In fact, several courts have specifically rejected the analysis adopted by the Ninth Circuit, ruling that public forum analysis is entirely irrelevant to the threshold question of state action. The issue of state action instead is controlled by *Marsh v. Alabama*, 326 U.S. 501 (1946), and its progeny, according to which a private entity's control of its own private property can be deemed state action subject to the First Amendment only in extremely rare circumstances involving the functional equivalent of an entire municipality, *i.e.*, a "company town." The opinion below is incompatible with the decisions establishing and applying that well-settled doctrine. The conflict between the approaches is made especially clear by a recent opinion of the Nevada Supreme Court, which reaches the opposite result from the Ninth Circuit's below in literally parallel circumstances involving the private sidewalk directly across the street from Venetian's.

A. Several Courts Reject The Relevance Of Public Forum Analysis To The Threshold Question Of State Action.

The Ninth Circuit's holding that Venetian is constrained by the First Amendment when controlling its private sidewalk was based on several factors relevant to determining whether a governmental restriction of speech takes place in a "public forum" or in a "nonpublic forum." In particular, the court emphasized the historical use as a public forum of the public sidewalk previously existing in the State right-of-way,

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678 ("These cases reflect . . . a 'forum based' approach for assessing restrictions that the *government* seeks to place on the use of *its* property.") (emphasis added); *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 800 (1985) ("[T]he extent to which the *Government* can control access depends on the nature of the relevant forum.") (emphasis added).

the continued use of Venetian's private sidewalk as a pedestrian thoroughfare, the absence of physical barriers separating Venetian's private sidewalk from the adjoining public sidewalks, and the ostensible dedication of Venetian's sidewalk to the State. *See* App. 17a, 19a. The Ninth Circuit thus inferred that Venetian was a state actor subject to the First Amendment from the conclusion that its private property possesses the characteristics of a "public forum."

A number of courts correctly reject that approach, holding that public forum analysis is irrelevant to the threshold question of state action. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 782-83 (1996) (op. of Kennedy, J.) (explaining first why "state action" exists, and describing "*the next step*" as determining through public forum analysis "what standard ... applies to determine whether the state action conforms to the First Amendment") (emphasis added). For instance, the D.C. Circuit has held that the "essential element" of "state action" "cannot be supplied by treating" the property in question as a "public forum[]." *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 123 (D.C. Cir. 1995), *aff'd in part, rev'd in part on other grounds sub nom., Denver Area*, 518 U.S. at 727.[3] The court rejected the notion that establishing the existence of a "public forum" could "avoid the state action problem." *Id.* at 121. A "'public forum,' or even a 'nonpublic forum,' in First Amendment parlance," the court explained, "is government property." *Id.* And state action necessarily "is present," as "the property is the government's and the government is doing the restricting." *Id.* Because public forum

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[3] Although this Court subsequently disagreed with the D.C. Circuit's determination that there was no state action involved in the case, the Court did not question the D.C. Circuit's conclusion that state action could not be found on the basis of public forum analysis. Instead, the requisite state action took the form of a federal statute. *See Denver Area*, 518 U.S. at 737 (plurality); *id.* at 782 (op. of Kennedy, J.).

standards thus *assume* state action, they cannot also be used to determine the existence of state action. *See id.* at 121-23.

The Seventh Circuit's decision in *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998), is to the same effect. That case addressed the validity of speech restrictions imposed in a public pier area. Because the pier authority that owned and controlled the pier was a governmental body, its regulation of expressive activity in the pier area clearly constituted state action. The court therefore properly applied public forum analysis to the pier authority's restrictions, ultimately relying on the same distinction between thoroughfare and non-thoroughfare public sidewalks central to the Ninth Circuit's decision below. *See id.* at 702; *see also* App. 12a (citing *Chicago Acorn*). But Judge Posner's opinion for the court prefaced the application of public forum standards with the recognition that the "pier if *privately* owned would not fall within the 'company town' exception . . . to the rule that the First Amendment constrains only government action." *Id.* at 699 (emphasis added). According to the Seventh Circuit, public forum doctrine – including the distinction between thoroughfare and non-thoroughfare sidewalks – thus is wholly irrelevant in the case of a "private entity," which has "a free hand in deciding whom to admit to its property and on what terms." *Id.*

State supreme courts are in accord, likewise concluding that public forum principles have no bearing on the threshold question of state action. For instance, the Oregon Supreme Court, after canvassing this Court's decisions addressing when a private entity's control of its property implicates the First Amendment, summarized the law as follows: "in determining whether the First Amendment protects petitioning or other political activity on private property, *the test is not whether that property amounts to the 'functional equivalent' of a public forum.*" *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 234 (Or. 2000) (emphasis added). Having flatly re-

jected the *exact* approach adopted by the Ninth Circuit below, the court then explained: "Rather, a court must determine whether, under the facts of the particular case, it could be said that state action implicating the First Amendment has occurred." *Id.*; *see also City of Jamestown v. Beneda*, 477 N.W.2d 830, 835 (N.D. 1991) ("First, we must determine whether the regulation of appellants' expressive activity by the Jamestown Mall constitutes state action. Second, if state action is involved, we must then characterize the forum involved to establish the constitutional standard by which we judge the mall's regulation of expressive activity.").[4]

In short, a number of courts, in direct disagreement with the Ninth Circuit below, specifically reject the application of public forum doctrine to determine whether a private entity's control of its own private property can be considered state action subject to the First Amendment.[5] That difference in

[4] A number of federal district courts and lower state courts have also held that public forum analysis is irrelevant to the antecedent question of state action. *See Rouse v. City of Aurora*, 901 F. Supp. 1533, 1538 (D. Colo. 1995); *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 68 (D. Mass. 1990); *State v. Scholberg*, 412 N.W.2d 339, 342-43 (Minn. Ct. App. 1987); *cf. SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1217-18 (N.Y. Ct. App. 1985).

[5] The public forum decisions relied upon by the Ninth Circuit below in no way suggest otherwise. Each of those cases plainly involved government action, and applied public forum rules to assess the constitutionality of that government action. For instance, the opinion below principally relies on *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). *See* App. 9a-10a, 11a, 14a. That case involved no threshold question of state action, however: it addressed whether a *municipality*'s actions amount to unconstitutional endorsement of religion. *See id.* at 497. *See also International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (public port authority regulations); *United States v. Kokinda*, 497 U.S. 720 (1990) (postal service regulation); *United States v. Grace*, 461 U.S. 171 (1983) (federal statute).

approach necessarily translates into a difference in results. That is because, as we discuss next, in courts outside the Ninth Circuit – *i.e.*, where public forum doctrine has no relevance to the threshold question of state action – a private entity's control of its own private property can constitute state action only in rare circumstances involving a "company town" or its functional equivalent.

B. The Ninth Circuit's Opinion Cannot Be Squared With This Court's Controlling State Action Decisions.

This Court's state action decisions address precisely the same question considered by the Ninth Circuit below – *viz.*, "[u]nder what circumstances can private property be treated as though it were public?" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978). The Court's answer is unequivocal: "when that property has taken on *all* the attributes of a town, *i.e.*, residential buildings, streets, a system of sewers, a sewage disposal plant, and a business block on which business places are located." *Id.* (emphasis in original) (internal quotation marks omitted). That "company town" exception was established in *Marsh v. Alabama*, 326 U.S. 501 (1946). But the Court's subsequent state action decisions limit *Marsh* to its unique circumstances, and the rule is now well-settled: a private entity's control of its own property can be considered state action in only one, exceptionally narrow situation – when the entity controls the functional equivalent of an entire municipality. *See Flagg Bros.*, 436 U.S. at 159; *Hudgens v. NLRB*, 424 U.S. 507, 513-21 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561-63, 569 (1972).[6]

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[6] At the time of the Court's decision in *Marsh*, "[m]any people in the United States live[d] in company-owned towns," and there was substantial evidence of "suppression of civil liberties in company towns and the need of those who live there for Constitutional protection." *Marsh*, 326 U.S. at 504, 509 n.6; *see* 4 Encyclopaedia of the Social Sciences, at 122-23 (E. Seligman ed. 1935) ("It is evident that for isolated non-union company towns, in which the employer owns all the land, no effective

Contrary to the view of the Ninth Circuit, therefore, the mere fact that a particular private sidewalk resembles a public sidewalk in its functional and physical attributes does not suffice to render the private owner subject to the First Amendment. *See Lee*, 505 U.S. at 698 (Kennedy, J., concurring) ("private spaces of similar character" to public spaces "are not subject to the dictates of the First Amendment"); *Tanner*, 407 U.S. at 563 (rejecting "suggestion that privately owned streets and sidewalks of a business district . . . are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"); *id.* at 569. As this Court has explained, there is "nothing in *Marsh* which indicates that if [only] one of the[] features [of a town] is present, *e.g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it." *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976) (internal quotation marks omitted). That statement captures the situation in this case to the letter, except that here not even an entire "business district" is at issue: the Ninth Circuit's decision "confiscates a part of an owner's private property" – Venetian's private sidewalk – "and gives its use to people who want to picket on it."

In contrast to the opinion below, accordingly, other courts of appeals have applied the straightforward "company

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steps have been taken to obtain for the employees the practise of those 'immemorial rights' of free speech and free assemblage which are supposedly guaranteed by federal and state constitutions. . . . Democracy is an empty mockery."). In the company town in *Marsh*, the Court has explained, "there were no publicly owned streets, sidewalks, or parks where [First Amendment] rights could be exercised," *Tanner*, 407 U.S. at 562, and the decision has no application where citizens enjoy a "wider number of choices" of venues for expressive activity than was available to one "who wished to distribute literature in Chickasaw, Ala., at the time that *Marsh* was decided," *Flagg Bros.*, 436 U.S. at 162. That of course is true of Las Vegas, and also of the Venetian property, which is surrounded by a number of public streets and sidewalks.

town" principle without pausing to assess whether the particular private property in question functionally resembles public property. *See Radich v. Goode*, 886 F.2d 1391, 1398 (3d Cir. 1989); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238 (1st Cir. 1981). *See also Chicago Acorn*, 150 F.3d at 699 (7th Cir.) (private owner cannot be treated as a state actor under "the 'company town' exception of *Marsh v. Alabama*" if private property "is not a town"); *United Auto Workers, Inc. v. Gaston Festivals, Inc.*, 43 F.3d 902, 909 (4th Cir. 1995) ("state action can only be found on the authority of *Marsh* where a private enterprise assumes *all* the attributes of a state-created municipality and performs the *full* spectrum of municipal powers") (alteration and internal quotation marks omitted) (emphasis in original). In addition, numerous lower courts have held that a private entity's regulation of speech on its own private sidewalk or street is unconstrained by the First Amendment.[7]

The only response of the Ninth Circuit below is to assert that "none of the cases" involve "privately-owned property [that] possess[es] all the attributes of a public forum," – *viz*, "a 'thoroughfare sidewalk,' seamlessly connected to public sidewalks at either end and intended for general public use." App. 18a. As we have seen, however, the Ninth Circuit stands alone in believing that public forum considerations of that kind are relevant to the question whether a private entity's control of its own property is state action. In addition, the state action decisions of this Court and other courts flatly reject the Ninth Circuit's suggestion that the use of private property by the public in general bears on whether the owner can be considered a state actor. *See Rendell-Baker v. Kohn*,

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[7] *See, e.g., Garrison v. City of Lakeland*, 954 F. Supp. 246 (M.D. Fla. 1997); *Rouse v. City of Aurora*, 901 F. Supp. 1533 (D. Colo. 1995); *Local 32B-32J Serv. Employees Int'l Union v. Port Auth.*, 462 F. Supp. 852 (S.D.N.Y. 1978); *International Soc'y for Krishna Consciousness v. Reber*, 454 F. Supp. 1385, 1390 (C.D. Cal. 1978).

457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action."); *Gaston Festivals, Inc.*, 43 F.3d at 909 ("It is not enough to establish state action . . . that an owner opens up his property for use by the public in general.") (internal quotation marks omitted). The conflict between the decision of the Ninth Circuit below and the state action decisions of this Court and other courts warrants the Court's review.

C. The Ninth Circuit's Opinion Conflicts With An Opinion Of The Nevada Supreme Court Addressing The Same Issues In Parallel Circumstances.

The Ninth Circuit's opinion conflicts most directly with the Nevada Supreme Court's decision in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). *See* Sup. Ct. R. 10(b).[8] *S.O.C.* addresses whether the public enjoys First Amendment rights on a privately-owned sidewalk fronting the Mirage Hotel, a sidewalk described as located "directly across the street from, and in every relevant respect identical to" Venetian's private sidewalk. *Id.* at 252 (Maupin, C.J., concurring in result). The principal opinion in *S.O.C.* holds that the Mirage Hotel is not a state actor, and therefore "cannot be held to the Constitutional requirements of the First Amendment" when controlling the distribution of leaflets on its private sidewalk. *Id.* at 247-48.[9] The opinion treats the

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[8] Venetian brought the decision in *S.O.C.* to the panel's attention in a letter filed with the court on May 21, 2001, pursuant to Fed. R. App. P. 28(j). The panel's opinion, which was issued on July 12, 2001, nevertheless does not address – or even mention – the Nevada Supreme Court's decision in *S.O.C.*

[9] Three Justices joined in the opinion, two Justices issued an opinion concurring in the result, and one Justice dissented. The court's principal opinion is viewed by both the concurrence and dissent to establish a "majority" holding. *See id.* at 252 (Maupin, C.J., concurring "in the majority's result"); *id.* at 252, 253, 254 & n.8 (Ross, J., dissenting) (disagreeing with the decision of the "the majority").

case as a straightforward application of this Court's state action decisions, reasoning that "*Marsh* has been consistently interpreted to apply to a very narrow set of facts where the entity in question performed the full spectrum of municipal powers." *Id.* at 248 (internal quotation marks omitted). And the opinion specifically rejects the argument that public forum analysis might compel a different result, explaining that, although the public might use the Mirage's private sidewalk as a pedestrian thoroughfare, "private property does not lose its private nature because it is open to the public." *Id.* at 249.

The opinion of the Nevada Supreme Court in *S.O.C.* creates a concrete conflict with the Ninth Circuit's decision in an unusually literal sense.[10] All of the "public forum" considerations relied on by the Ninth Circuit for concluding that Venetian's control of its private sidewalk is subject to the First Amendment would apply equally to the Mirage's private sidewalk located directly across the street. But opposite constitutional rules now apply to the two parallel sidewalks. If anything, in fact, the Mirage should more readily be found subject to the First Amendment than Venetian, because the Mirage sidewalk – unlike Venetian's – is explicitly encumbered by a public right-of-way for pedestrian passage. *See id.* at 245; p. 26, *infra*. The conflict between the two opinions and the broader conflicts resulting from the Ninth Circuit's decision can only be resolved by this Court.

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[10] *Cf. Mirage wins rulings*, Las Vegas Sun, Oct. 3, 2001 (the "decision by the [Nevada] Supreme Court [in *S.O.C.*] conflicts with one by the 9th U.S. Circuit Court of Appeals that ruled that the private sidewalk across the street at the Venetian hotel-casino was public and the Culinary Union had a constitutional right to demonstrate on it") (available at www.lasvegassun.com/sunbin/stories/text/2001/oct/03/512437560.html).

II. THE OPINION BELOW ENTAILS SIGNIFICANT IMPLICATIONS FOR THE BASIC RIGHTS AND EXPECTATIONS OF PROPERTY OWNERS.

A. The Ninth Circuit's Approach Impairs The Most Basic Rights Of Private Property Ownership.

The decision below entails substantial implications for the fundamental rights and expectations of private property owners throughout the Ninth Circuit. The most basic right of private property ownership is the right to exclude objectionable uses. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). But the majority's ruling "greatly undermine[s] private property rights," by forcing private entities to permit highly disruptive and objectionable uses of their property by the public if the property is deemed "of a type traditionally owned and operated by the public" or is "used in a manner traditionally associated with the public." App. 32a (Brunetti, J., dissenting).

The implications of the opinion below are especially severe where, as in this case, a private entity is forced to make room on its own private property for picketing and protests deliberately designed to injure its own interests. This Court's decisions speak directly to that situation: "To hold that store owners are compelled by [the First Amendment] to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Hudgens*, 424 U.S. at 517 (internal quotation marks omitted). That is precisely the result of the Ninth Circuit's decision below, however. In fact, by requiring Venetian to host expressive activity calculated to undermine its own interests, the Ninth Circuit infringes Venetian's *own* First Amendment right to refuse the "use [of] *its* property as a vehicle for spreading a message with which it disagrees." *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 17 (1986) (plurality) (emphasis in original).

Of course, if the public requires unrestricted access to Venetian's private sidewalk for expressive activity, the State always retains its full authority to convert the sidewalk into public property at any time by exercising the power of eminent domain. In fact, this Court has observed – in respect to precisely the property interest that would be relevant here, *i.e.*, a "public easement across a landowner's premises" – that "one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). But the effect of the Ninth Circuit's below is to convert Venetian's private sidewalk into public property without payment of any compensation at all. That result strikes at the heart of the basic rights of a property owner. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land . . . for public use, . . . a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (citations and internal quotation marks omitted).[11]

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[11] The Ninth Circuit's recognition of a First Amendment right-of-access to Venetian's property also stands in substantial tension with *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in the circumstances of this case. *Lechmere* establishes that non-employee union organizers have no right under the federal labor laws to access an employer's private property for expressive activity, "*except* in the rare case where the inaccessibility of employees makes ineffective" the normal means of communication, as in an isolated logging or mining camp. *Id.* at 537-40. Under *Lechmere*, the federal labor laws of course afford union organizers no right to access Venetian's private property, and the Ninth Circuit has said so in precisely analogous circumstances. *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 996-98 (9th Cir. 1992) (holding union members have no *Lechmere* right to access hotel-casino's private driveway). But the Ninth Circuit's decision below effectively nullifies that body of law

B. The Ninth Circuit's Approach Prevents Private Owners From Negotiating The Protection Of Their Property Rights.

The opinion below is particularly troubling because it undermines the ability of private property owners to "negotiate and determine the rights that apply to their property." App. 32a (Brunetti, J., dissenting). The Ninth Circuit's misconceived "public forum"-based approach gives short shrift to the unambiguous intentions of Venetian and the State in two respects: first, by taking into account the parties' negotiated resolution only to the extent it informs one of the many "public forum" considerations that resulted in treatment of the private sidewalk as public property; and second, even insofar as the parties' intentions weighed into determining whether the private sidewalk had been "dedicated to public use," by disregarding – and, in fact, inverting – the explicit and unequivocal terms of the 1999 Agreement. In view of the court's refusal to give effect to the parties' unmistakable intentions in the 1999 Agreement, the upshot of the opinion below is that, no matter how explicitly and clearly a private entity preserves its property rights, it nonetheless will be deemed a state actor constrained by the First Amendment whenever its property can be seen functionally to resemble a "public forum."

1. Although the majority purports to locate a "dedication" of Venetian's sidewalk to the public in the 1999 Agreement, *see* App. 14a-15a, that suggestion cannot be taken seriously. A "dedication" requires "proof of an intention on the part of the owner of land to donate it to the local government, and an acceptance thereof by the local government." 2 Stevenson, Antieau on Local Government Law, § 30.05[1] (2d ed. 2000). And when a property owner dedi-

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as it applies to Venetian's private sidewalk by granting union members a right-of-access under the First Amendment.

cates a sidewalk, the government acquires a right-of-way easement across the land. *See* 11A McQuillen, Municipal Corporations § 33.68 (2000). *See also Denver Area*, 518 U.S. at 827 (op. of Thomas, J.) (dedication of property to public use "create[s] enforceable public easement[] in the dedicated land"). An intent to dedicate property "must be clearly and unequivocally manifested." 11A McQuillen, *supra*, § 33.68 (2000); *see, e.g., Shearer v. City of Reno*, 136 P. 705, 707 (Nev. 1913).

Here, however, the clear and unequivocal intent of the parties was *not* to dedicate Venetian's sidewalk to the public. To begin with, the agreement explicitly distinguishes between Venetian's "private sidewalk" and the adjoining "public sidewalks," App. 20a (¶ 1), confirming that the latter – as to which the State does possess a right-of-way – differ categorically from the former. In fact, the agreement's unfailing use of "private" to describe Venetian's sidewalk is fully dispositive in establishing the absence of a dedication: it is black-letter property law that "[r]eservation of land as a private way conclusively negatives an intent to dedicate a tract as a public street." 2 Antieau, *supra*, § 30.05[4].[12]

The parties underscored their intention not to dedicate the sidewalk throughout the agreement. For instance, although dedication of a sidewalk to the public results in transfer of a right-of-way easement to the government, *see* 11A McQuillen, *supra*, § 33.68, the 1999 Agreement contemplates only that Venetian might be required *in the future* to "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk, if, and only if, Venetian ever "removed, al-

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[12] *Freedom from Religion Foundation v. City of Marshfield*, the decision principally relied on by the majority in finding a dedication to public use, *see* App. 14a, is instructive. In that case, the parcel of land was subject to a restriction requiring its use for "*public* park purposes." 203 F.3d at 490 (emphasis added); *see id.* at 494, justifying the conclusion that the "land [was] dedicated to public use," *id.* at 494.

tered, or abandoned" its "private sidewalk." App. 21a (¶ 7). That provision establishes beyond doubt that no such dedication could already have occurred in the 1999 Agreement. That is confirmed by the provisions making clear that the State "is not taking any private property interest with this document" and that Venetian "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments," App. 21a-22a (¶¶ 1, 6), neither of which could be consistent with the dedication of a right-of-way to the State.

Finally, Venetian shoulders exclusive responsibility for "maintaining" the "private sidewalk" in "an orderly, clean, safe, and sanitary condition," bears "all cost, expense, or liability arising from" the sidewalk's use, App. 20a (¶¶ 4, 5), and continues to pay property taxes on the land, all of which is incompatible with dedication of a public sidewalk and acceptance of the dedication by the State. *See* 39 Am. Jur. 2d, Highways, § 94 (1999) ("primary duty of maintaining the entire area of a sidewalk . . . dedicated for public use . . . in reasonable repair for the use of pedestrians, rests upon the municipality, and not upon the owner"); 11A McQuillen, *supra*, § 33.53 ("levy and collection of general and special taxes . . . indicates an intention not to accept" dedication). In short, it is hard to imagine how the parties could more clearly have expressed their intention not to dedicate the sidewalk to the public.

In the teeth of all of those provisions, the opinion below nevertheless finds the requisite unequivocal intent to make a dedication, pointing principally to language requiring that the "private sidewalk . . . satisfy the Americans with Disabilities Act" by "providing unobstructed pedestrian access." App. 20a (¶ 1). But that provision, as the dissent explains, App. 35a-36a, simply echoes the requirement in the ADA regulations that all private entities operating a place of public accommodation provide an "unobstructed way of pedestrian

passage" from any "exterior approach . . . including sidewalks." 28 C.F.R. § 36.403(e)(1). And the reference to "unobstructed pedestrian access" – especially when considered in the context of the ADA's parallel language – plainly concerns physical "obstructions," not discretionary decisions by the owner to regulate certain uses. *See* Black's Law Dictionary 1077 (6th ed. 1990) (defining "obstruct a road or way" as "to fill with barricades or impediments"). That is confirmed by the separate provision requiring Venetian to "remove" any "improvements" that become an "obstruction" to "pedestrian or vehicular traffic." App. 21a (¶ 8).[13]

2. In any case, even assuming the reference in the ADA provision to "unobstructed pedestrian access" somehow establishes an unequivocal intention to dedicate a pedestrian right-of-way to the State, the circumstances still would involve a direct conflict with the Nevada Supreme Court's decision in *S.O.C.* There, the Mirage Hotel had explicitly conveyed a "perpetual pedestrian easement" to the government in its zoning and building plan, 23 P.3d at 245, but the court nonetheless found that "the mere existence of the easement does not implicate the protections of the First Amendment."

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[13] In discussing its interpretation of the agreement, the panel "notes" selected responses of Venetian's counsel in a hearing in the district court. *See* App. 14a. But any reliance on those statements, as the dissent observes, "creat[es] the proverbial mountain out of a molehill." App. 35a. In Nevada – as elsewhere – the "extent of . . . any conveyance of rights in real property, is fixed by the language of the instrument," *S.O.C.*, 23 P.3d at 246, not by responses in court. In any event, counsel emphasized in the same hearing that the sidewalk "has not . . . been dedicated to public use" and that it was "clear that there has been no dedication." Unions' Supp. Exc. Rec. 151, 154 (filed in 9th Cir.) (quoting transcript). Other statements that might incorrectly have suggested a contrary understanding of course cannot alter the agreement's legal effect. That is particularly the case given that the district court placed no weight on the statements, instead holding correctly that Venetian had not "waived its right to exclude." App. 57a.

Id. at 246. In the court's view, a "party is privileged to use another's land only to the extent expressly allowed by the easement," and "the easement, by its express language, is limited to pedestrian uses of the sidewalk to travel from point A to point B." *Id.* at 247. As a result, "the existence of the easement . . . does not transform private property into a public forum for constitutional scrutiny." *Id.* at 247. Because the opinion below finds that Venetian's private sidewalk *is* a "public forum for constitutional scrutiny," it presents a direct conflict with *S.O.C.* even assuming Venetian somehow *did* dedicate a pedestrian right-of-way.

But the Court's review is particularly warranted because of the broader implications of the Ninth Circuit's analysis for the settled expectations of property owners. The "public forum" approach of the opinion below entails giving the parties' explicitly stated intentions no more weight than such factors as whether the court deems the private property to physically resemble public property or whether the court considers the private owner to have taken adequate measures to structurally distinguish its property; and even then, the court effectively inverts the clear terms of the parties' agreement. Indeed, the majority allows that its construction of the agreement is shaped by its assumption that the private sidewalk was to have precisely the same public function as the public sidewalk previously existing within the State's right-of-way. App. 7a.

But the plain terms of the 1999 Agreement require Venetian to "construct and maintain" a "*private* sidewalk," on "*its* property," App. 20a (¶ 1) (emphasis added), which is a site-specific land use condition of the kind frequently found in agreements between developers and government authorities. *See* 3 E. Ziegler, Rathkopf's The Law of Zoning and Planning, ch. 40 (4th ed. 1999). The requirement is precisely analogous, for instance, to a condition that a property owner construct a parking lot or an access lane at a particular loca-

tion on the site to ameliorate traffic issues arising out of a proposed development. *See* 5 Ziegler, *supra*, ch. 58. Of course, both parties to the 1999 Agreement envisioned that the public generally would use Venetian's "private sidewalk" for pedestrian transit. After all, it is in Venetian's clear commercial interest to maximize pedestrian access to its hotel-casino frontage. But an "intent to dedicate is not shown by the act of the owner of land in establishing a private way . . . even though the way is also used by the public generally without objection by the owner." 11A McQuillen, *supra*, § 33.32. That is precisely the situation here.

The State, understanding that both parties shared an interest in promoting ample pedestrian access, but doubtless also taking into account the significant advantages of avoiding the costs, burdens, and liabilities associated with maintaining a public sidewalk, agreed to let Venetian control and maintain a "private" sidewalk rather than to negotiate for dedication of a right-of-way. And the State of course understood that it could exercise the power of eminent domain at any time should the need to acquire a public sidewalk become necessary. But the opinion below simply ignores the bargain reached by the parties, somehow finding a dedication to the "public" in an agreement concerning a "private" sidewalk. *See* App. 25a (Brunetti, J., dissenting) (the "State should not be given by this court property rights it clearly bargained away," but "the majority does exactly that").

Because the majority opinion below ignores the plain terms of the governing agreement, reaching an interpretation at odds with the one adopted by the district court and acknowledged by parties on both sides of this case,[14] the opin-

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[14] *See* 57a (district court holding that Venetian has not "waived its right to exclude"); Venetian Supp. Exc. Rec. 223 (filed in 9th Cir.) (quoting Unions' acknowledgement in district court brief that 1999 Agreement "does not contain a requirement" that Venetian "give[] up the right to exclude unwanted pedestrians from its sidewalks"); Gov. Off. Resp. Br. 6

ion below effectively makes it impossible for a private entity in the Ninth Circuit to assure that it has preserved its basic rights of private property ownership. The outcome is harmful to governments as well, because the uncertainty surrounding whether the parties' intentions will be recognized complicates the ability of both government and private owners to transfer interests in land to one another. The effect of the majority's reasoning, in short, is to afford wide license to courts to convert private property into public property whenever the private property at issue bears the functional attributes of a public forum, even if the parties have clearly expressed an intention to the contrary.

C. The Ninth Circuit's Opinion Gives Rise To A Number Of Intractable Issues For Private Entities Deemed To Be Sovereigns.

The result of the Ninth Circuit's opinion is to designate Venetian a government actor limited to imposing reasonable and content-neutral time, place, and manner restrictions of speech on its own private sidewalk. *See* App. 61a. A host of intractable problems of implementation arise from the treatment of Venetian as a government entity. For instance, because Venetian in fact lacks sovereign powers, it is far from clear how it could effectively implement and enforce its time, place, and manner regulations. Unlike other sovereigns, Venetian has no police force or judicial system capable of enforcing its regulations. And if Venetian relied on self-help measures, would it be bound by the Fourth Amendment, even though it – unlike other sovereigns – might not enjoy qualified immunity from damages liability?

Venetian's ostensible status as a government entity might also affect its own exercise of First Amendment rights on its private property. That could raise especially difficult issues

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n.4 (filed in 9th Cir.) (stating that "Venetian sidewalk . . . is located on private property, not a public street or right-of-way").

where Venetian's free exercise and free speech rights as a private entity appear to collide with any Establishment Clause restrictions it might face as a government actor. For instance, if Venetian wished to display religious symbols on its private sidewalk, or to hold a religious celebration or function on the plaza area extending onto its private sidewalk, would its conduct merit protection under the Free Speech and Free Exercise Clauses, or face constraints under the Establishment Clause?

A separate set of problems arise from the ambiguity surrounding the relationship between Venetian and core sovereigns such as the State or County. It is unclear, for instance, whether Venetian would be required to coordinate its "governmental" policies with associated ones of the State or County. Accordingly, Venetian conceivably could promulgate time, place, and manner restrictions that are perfectly reasonable as a matter of law, but that bear no necessary relation to comparable restrictions of the County or State. For instance, Venetian could issue a permit to conduct a demonstration along its stretch of Las Vegas Boulevard for a different time or on a different day than the corresponding permit issued by the County.

Those various problems attest to the soundness of this Court's rule holding that a private entity's control of its own property cannot be considered state action unless it performs *all* the government functions of a town. The Ninth Circuit's refusal to adhere to that rule in the opinion below warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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